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FILED

NOV 21 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION
15

16 DONALD MAY,

17 Plaintiff,

18 v.

19 SEMBLANT, INC., a corporation,
20 and STEVE LOWDER, an
individual,

21 Defendants.
22

Case No. CV13-01576 EJD

STIPULATED PROTECTIVE ORDER

Ctrm: 4

Judge: Hon. Edward J. Davila

MODIFIED BY THE COURT

(RE: DKT. 34)

23 Disclosure and discovery activity in this Action are likely to involve
24 production of confidential, proprietary, or private information for which special
25 protection from public disclosure and from use for any purpose other than
26 prosecuting this litigation may be warranted. Accordingly, Plaintiff Donald May
27 ("Plaintiff") and Defendants Semblant, Inc. and Steve Lowder ("Semblant") hereby
28

1 stipulate to and petition the court to enter the following Stipulated Protective Order.
2 The parties acknowledge that this Protective Order does not confer blanket
3 protections on all disclosures or responses to discovery and that the protection it
4 affords from public disclosure and use extends only to the limited information or
5 items that are entitled to confidential treatment under the applicable legal
6 principles. The parties further acknowledge, as set forth in paragraph 15 below,
7 that this Protective Order does not entitle them to file confidential information
8 under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed
9 and the standards that will be applied when a party seeks permission from the court
10 to file material under seal.

11 **1. Right to Designate.** Any party to this Action and any non-party from
12 whom discovery is sought in connection with this Action who agrees to be bound
13 by the procedures of this Protective Order ("the Designator") may designate any
14 "Protected Information" produced by such party as "Confidential."

15 (a) "Protected Information" is defined herein as any information, document,
16 testimony, thing, data, file, or other material that constitutes or contains proprietary,
17 confidential, business, financial, commercial or technical information, the
18 disclosure of which is likely to cause harm to the competitive position of the party
19 making the designation, or that constitutes, reflects, or concerns trade secrets,
20 know-how, or proprietary data.

21 (b) "Recipient" as used herein refers to any party who receives Protected
22 Information designated pursuant to this Protective Order.

23 (c) Protected Information shall not include information or material that: (i)
24 was, is, or becomes public knowledge in a manner other than by violation of this
25 Protective Order or other fault of the Recipient; (ii) is acquired by the Recipient
26 from a non-party not owing a duty of confidentiality to the Designator; (iii) before
27 receipt from the Designator, was lawfully possessed by the Recipient without a
28 duty of confidentiality to the Designator; (iv) is disclosed by the Designator to a

1 third party not owing a duty of confidentiality to the Designator; or (v) was
2 independently developed by the Recipient.

3 **2. Confidential Designation.** By designating material "Confidential," the
4 Designator is representing that it believes in good faith that the designated material
5 is entitled to protection under Rule 26(c)(1)(G) of the Federal Rules of Civil
6 Procedure. Designations of "Confidential" under this Protective Order shall apply
7 to the Protected Information so designated, all copies, extracts, compilations, and
8 summaries thereof, and any information contained therein.

9 (a) "Confidential" material includes any Protected Information that
10 constitutes or contains proprietary, confidential, or commercially sensitive
11 information.

12 **3. Limitations on Use of Protected Information.** No Recipient of
13 Protected Information shall use such information for any purpose other than in
14 connection with this Action, including any appeals. Such Protected Information
15 shall be maintained in confidence by the Recipient and shall not be disclosed to
16 anyone except as provided herein, by further written agreement of the parties, or by
17 further order of the court.

18 **4. Disclosure of "Confidential" Protected Information.** Protected
19 Information designated "Confidential" shall not be disclosed or otherwise
20 communicated to any person except:

21 (a) Outside Counsel of record for the parties. As used herein, "Outside
22 Counsel" shall mean attorneys (and their clerical support staff) who are not
23 employees of a party but are retained to represent or advise a party and have
24 appeared in this Action on behalf of that party or are affiliated with a law firm
25 which has appeared on behalf of that party.

26 (b) The officers, directors, and employees (including House Counsel) of the
27 Recipient to whom disclosure is reasonably necessary for this litigation and who
28

1 have executed an undertaking in the form of Exhibit A. As used herein, "House
2 Counsel" shall mean attorneys who are employees of the Recipient.

3 (c) Testifying experts, non-testifying experts, consultants, and/or consulting
4 firms (and their clerical support staff) for each of the parties, specifically engaged
5 by counsel or the parties to assist in this Action, who have been properly designated
6 in accordance with paragraph 5 and have executed an undertaking in the form of
7 Exhibit A.

8 (d) Vendors retained by a party or by Outside Counsel, including without
9 limitation: graphics or design services retained for purposes of preparing
10 demonstrative or other exhibits for deposition, trial or other court proceedings; copy
11 services, companies that digitize documents, and other similar document
12 management vendors; jury research or trial consulting services. Any such vendors
13 shall first execute an undertaking in the form of Exhibit A. Such agreement may be
14 signed by an authorized agent on behalf of a vendor that is an entity; it need not be
15 signed by each employee of a vendor performing services.

16 (e) Translators of foreign language documents retained to provide
17 translations of any Protected Information, who are not employees of any of the
18 parties and who have executed an undertaking in the form of Exhibit A.

19 (f) Mediators, retained by the parties or assigned by the court, who have
20 executed an undertaking in the form of Exhibit A.

21 (g) Mock jurors, retained by the parties or vendors thereof, who have
22 executed an undertaking in the form of Exhibit A.

23 (h) Any person employed by the Designator of the Protected Information
24 being examined as a witness during a deposition or at trial, to whom disclosure is
25 reasonably necessary. Any such person must have first executed an undertaking in
26 the form of Exhibit A.

27 (i) The author, actual recipient, or intended recipient (as identified in the
28 Protected Information) of the Protected Information.

1 (j) The court and its personnel, pursuant to paragraph 15, jurors, and any
2 court officers, court stenographers, and outside copy services used by the court
3 whose function requires them to have access to Protected Information.

4 (k) Any other person upon order of the court.

5 (l) Any other person upon written consent of the Designator.

6 **5. Designation of Consultants.** Any Recipient may designate a reasonable
7 number of retained expert consultants (either testifying or non-testifying)
8 ("Consultants") to have access to Protected Information under this Protective Order,
9 if the consultants: (i) are neither employees of a party nor anticipated to become
10 employees of a party in the near future, (ii) are engaged by or on behalf of a party
11 as bona fide consultants or experts for purposes of this Action, and (iii) who have
12 executed an undertaking in the form of Exhibit A. The following procedures shall
13 govern the designation of Consultants under this Protective Order:

14 (a) The party seeking to designate a Consultant shall first make a written
15 request to the Designator that includes: (i) sufficient information to fully identify
16 the Consultant; (ii) a current résumé or curriculum vitae of the Consultant, if
17 available; and (iii) identification of all consulting engagements for or adverse to the
18 opposing party.

19 (b) A party that makes a request to designate a Consultant and provides the
20 information specified in the preceding subparagraph may disclose Protected
21 Information to the identified Consultant unless, within fourteen (14) days of
22 delivering the request, the party receives a written objection from the Designator
23 setting forth in detail the grounds on which it is based. The Designator may object
24 in good faith to the proposed Consultant if facts available to that party show that
25 there is a reasonable likelihood that the proposed Consultant will use or disclose
26 Protected Information for purposes other than those permitted by this Protective
27 Order, or if the Consultant states that he or she is unable to disclose information
28 concerning other consulting engagements due to a non-disclosure agreement.

1 (c) A party that receives a timely written objection must meet and confer
 2 with the Designator (through direct voice to voice dialogue) to try to resolve the
 3 matter by agreement within seven (7) days of the written objection. If no
 4 agreement is reached, the objecting Designator may seek a ruling from the court ^{IN}
 5 and shall bear the burden of showing why disclosure should not be permitted. ^{COMPLIANCE WITH THE UNDERSIGNED'S STANDING ORDER RE CIVIL DISCOVERY DISPUTES,}

6 Pending a ruling by the court, the proposed Consultant shall not have access to
 7 Protected Information unless such access has been previously approved.

8 **6. Inadvertent Disclosure of Designated Protected Information.** In the
 9 event of any disclosure of Protected Information other than in a manner authorized
 10 by this Protective Order, counsel for the party responsible for the unauthorized
 11 disclosure shall immediately notify counsel for the Designator and shall make every
 12 effort to further prevent unauthorized disclosure, including retrieving all copies of
 13 the Protected Information from the unauthorized recipient(s) thereof and securing
 14 the agreement of the unauthorized recipient(s) not to further disseminate the
 15 Protected Information in any form. Compliance with the foregoing shall not
 16 prevent the Designator from seeking further relief from the court.

17 **7. Designating Protected Information.** No designation of documents or
 18 things shall be effective unless there is placed or affixed on such material a
 19 "Confidential" marking as required herein, except as provided for in paragraphs 11.
 20 The designation of information or material as "Confidential" for purposes of this
 21 Protective Order shall be made in the following manner:

22 (a) The Designator shall affix the legend "Confidential," as appropriate, to
 23 each page of any document containing such information at the time such documents
 24 are produced, or as soon thereafter as the Designator becomes aware of the
 25 confidential nature of the information or material disclosed and sought to be
 26 protected hereunder. All documents produced from hard copy that the Designator
 27 deems "Confidential" shall be so marked by the Designator in accordance with this
 28 subparagraph, even if produced in the form of electronic images.

1 (b) In the case of documents produced on magnetic, optical, or other
2 encoded media (except for images of hard copy documents), the Designator shall
3 affix the legend "Confidential," as appropriate, on the outside of the storage
4 medium (e.g., the magnetic disk enclosure or optical disk). A Recipient desiring to
5 make electronic copies of such media or portions thereof shall — if permitted to
6 make such copies under the terms of this Protective Order — affix the same
7 designation on the copy as exists on the original, produced medium. A party
8 desiring to make a "hard copy" of all or a portion of the contents of information or
9 documents stored electronically — if permitted to make such copies under the
10 terms of this Protective Order — shall place on each page of such hard copy the
11 same designation found on the outside of the storage medium.

12 (c) In the case of transcripts or recordings of depositions or other pretrial
13 proceedings in this Action, counsel for the Designator may state on the record
14 during such deposition or other proceeding that the entire transcript or a portion
15 thereof shall be designated as "Confidential," as appropriate; or may give written
16 notice of such designation sent to all parties within fourteen (14) days after the
17 transcript or recording is sent to counsel by the court reporter. If no such
18 designation is made at the time of the testimony or other proceeding, the parties
19 shall treat all transcripts and recordings of testimony and proceedings as
20 "Confidential" hereunder until fourteen (14) days after the transcript or recording is
21 sent to counsel by the court reporter. The parties may modify this procedure for
22 any particular deposition or proceeding through agreement on the record at such
23 deposition or proceeding or otherwise by written stipulation, without further order
24 of the court. If any document or material designated as "Confidential" is used
25 during the course of a deposition, that portion of the deposition record reflecting
26 such document or material shall be stamped with the designated degree of
27 confidentiality, and access thereto shall be limited pursuant to the other terms of
28 this Protective Order.

1 (d) In the case of pleadings, briefs, memoranda, exhibits, written discovery
2 responses, or other documents prepared in this Action for the purpose of discovery
3 or court proceedings, counsel shall affix the legend "Confidential," as appropriate,
4 to each page of any document containing any such Protected Information at the
5 time such documents are served or filed, or promptly after learning that the
6 document contains Protected Information.

7 **8. Designation With Respect to Original or Native Documents.** In the
8 event the Designator elects to produce documents or other materials in native or
9 original form for inspection or sampling, no confidentiality designations need be
10 made by the producing party in advance of the inspection, and the inspection shall
11 not be deemed to constitute an express or implied waiver (a) of any right to
12 designate such documents as "Protected Information" under this Order or (b) of any
13 applicable privilege (e.g., attorney-client privilege, work-product doctrine, common
14 interest doctrine, or other applicable privilege). All such documents or other
15 material shall be considered as marked "Confidential." After selection by the
16 inspecting party of specified documents or material for copying, the Designator
17 shall place the appropriate confidentiality designations on the copies of the selected
18 documents or materials produced to the inspecting party.

19 **9. Inadvertent Failure to Designate.** If a party inadvertently produces any
20 trade secret or other confidential information without designating it as Protected
21 Information, the Recipient may disclose such information to others until the
22 Recipient is notified or becomes aware of the error, unless the Recipient knows or it
23 is obvious from the face of the document that it contains trade secret or other
24 confidential information that the producing party intended to designate as Protected
25 Information pursuant to this Protective Order. If the producing party notifies the
26 Recipient in writing of an inadvertent failure to designate information as Protected
27 Information, the Recipient will thereafter treat such information as if it had been so
28 designated when produced and will make a good faith effort to secure the prompt

1 return of all copies of documents containing such information that it distributed or
 2 disclosed to persons not authorized to have access to such information under this
 3 Protective Order, as well as any copies made by such persons.

4 **10. Challenging Confidentiality Designations.** The propriety of a
 5 designation of Protected Information may be challenged at any time, and the failure
 6 to promptly challenge a designation of Protected Information shall not constitute an
 7 admission that the information constitutes or incorporates a trade secret or other
 8 confidential information of the Designator within the scope of Fed. R. Civ. P.

9 26(c)(1)(G). If a Recipient desires to challenge a designation of Protected

10 Information, the Recipient shall confer with the Designator, explain the basis for
 11 the challenge, and seek to resolve the issue. If the dispute is not thereby resolved,

12 *IN COMPLIANCE WITH THE UNDERSIGNED'S STAMPING ORDER RE CIVIL DISCOVERY*
 the Recipient may apply to the court for relief and the Designator shall bear the *DISPUTES*

13 burden of proving that the information was properly designated.

14 **11. Protected Information Sought by Non-Parties.** If a Recipient is (a)
 15 subpoenaed in another action, (b) served with a demand in another action to which
 16 it is a party, or (c) served with any other legal process by one not a party to this
 17 Action, seeking Protected Information that was produced in this Action, the
 18 Recipient shall (i) object to its production to the extent permitted by law, setting
 19 forth the existence of this Protective Order; (ii) within seven (7) business days after
 20 receipt thereof, or the earliest practicable date thereafter, give written notice by e-
 21 mail, hand, or facsimile of such process or discovery request together with a copy
 22 thereof, to counsel for the Designator; (iii) cooperate to the extent necessary to
 23 permit the Designator to seek to quash such process or discovery request; and (iv)
 24 not produce or disclose such Protected Information until the Designator consents in
 25 writing or unless in compliance with an order specifically requiring production or
 26 disclosure by a court, U.S. or foreign government agency, or administrative body of
 27 competent jurisdiction. Nothing herein shall be construed as requiring any party or
 28 other person subject to this Protective Order to challenge or appeal any order

AND NOTHING IN THESE PROVISIONS SHOULD BE CONSTRUED AS AUTHORIZING OR ENCOURAGING A PARTY IN THIS ACTION TO DISOBEY ANY SUCH OTHER LEGAL PROCESS OR ORDER.

1 requiring production of Protected Information or subject itself to any penalties for
2 noncompliance with any legal process or order. Compliance with such other legal
3 process or order by a person or party who has otherwise complied with the
4 provisions of this paragraph will not be a violation of this Protective Order.

5 **12. Filing Protected Information.** Without written permission from the
6 Designator or a court order secured after appropriate notice to all interested persons,
7 a party may not file any Protected Information in the public record in this Action.
8 A party that seeks to file under seal any Protected Information must comply with
9 Civil Local Rule 79-5. Protected Information may only be filed under seal pursuant
10 to a court order authorizing the sealing of the specific Protected Information at
11 issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a
12 request establishing that the Protected Information at issue is privileged, protectable
13 as a trade secret, or otherwise entitled to protection under the law. If a Recipient's
14 request to file Protected Information under seal pursuant to Civil Local Rule 79-
15 5(e) is denied by the court, then the Recipient may file the Protected Material in the
16 public record pursuant to Civil Local Rule 79-5(e)(2), unless otherwise instructed
17 by the court.

18 **13. Use of this Protective Order by Non-Parties.** Any non-party who
19 produces documents and/or deposition testimony in this matter shall be provided
20 with a copy of this Protective Order and notified of the opportunity to designate
21 materials in accordance therewith. Any non-party that discloses Protected
22 Information under this Protective Order shall be entitled to the rights and
23 obligations of a party under this Protective Order with respect to the Protected
24 Information produced. Non-parties may move the court to enforce the provisions of
25 this Protective Order. The use of this Protective Order by a non-party does not
26 entitle that non-party to access the Protected Information produced by any other
27 party or non-party in this action. ALL DISCLOSURE AND DISCOVERY DISPUTES
28 ARE SUBJECT TO THE UNDERSIGNED'S STANDING ORDER RE CIVIL
DISCOVERY DISPUTES.

1 **14. No Application to Party's Own Information.** This Protective Order
2 has no effect upon, and shall not apply to, a party's use or disclosure of its own
3 confidential information for any purpose.

4 **15. Consent to Jurisdiction.** All persons who have access to Protected
5 Information under this Protective Order shall be bound by this Protective Order and
6 shall be subject to the jurisdiction of this court for purposes of enforcing this
7 Protective Order.

8 **16. No Admission.** Entering into, agreeing to, or otherwise complying with
9 the terms of this Protective Order, and/or producing or receiving Protected
10 Information under this Protective Order, shall not:

11 (a) Operate as an admission by any party that the restrictions and procedures
12 set forth herein constitute or do not constitute adequate protection for any particular
13 information;

14 (b) Prejudice in any way the right of any party to object to the production of
15 documents they consider not subject to discovery, whether on grounds of privilege
16 or otherwise;

17 (c) Prejudice in any way the right of any party to object to the authenticity or
18 admissibility into evidence of any document, testimony or other evidence;

19 (d) Prejudice in any way the right of any party to seek a determination by the
20 court as to whether any information or material should be subject to the terms of
21 this Protective Order;

22 (e) Prejudice in any way the right of any party to petition the court for a
23 further protective order relating to any purportedly confidential information; or

24 (f) Prevent a Designator from agreeing in writing or on the record during a
25 deposition or hearing in this Action to alter or waive the provisions or protections
26 provided for herein with respect to any particular information or material.

27 **17. Modification / Trial.** It is the intention of the parties that the provisions
28 of this Protective Order shall govern discovery and other pretrial proceedings in this

1 Action. Nonetheless, each of the parties hereto shall be entitled to seek
 2 modification of this Protective Order by application to the court upon notice to the
 3 other parties hereto and upon a showing of good cause. If this Action proceeds to
 4 trial, the parties shall meet and confer on the procedures necessary to protect the
 5 confidentiality of any documents, information, and transcripts used in court during
 6 trial.

7 **18. Effective Before Entry.** The parties agree to be bound by the terms of
 8 this Protective Order once it is signed by all the parties hereto, pending its entry or
 9 the entry of an alternative Protective Order by the court. Any violation of the terms
 10 of this Protective Order during such pendency shall be subject to the same sanctions
 11 and penalties as if this Protective Order had been entered by the court.

12 **19. Survival After Final Disposition.** Even after Final Disposition of this
 13 Action, the confidentiality obligations imposed by this Protective Order shall
 14 remain in effect until a Designator agrees otherwise in writing or a court order
 15 otherwise directs. *FOR A PERIOD OF SIX MONTHS AFTER FINAL DISPOSITION OF THIS*
 16 *ACTION, THIS COURT WILL RETAIN JURISDICTION TO ENFORCE THE TERMS OF THIS ORDER.*
20. Obligations Upon Final Disposition. "Final Disposition" shall be

17 deemed to be the later of (1) dismissal of all claims and defenses in this action, with
 18 or without prejudice; and (2) final judgment herein after the completion and
 19 exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,
 20 including the time limits for filing any motions or applications for extension of time
 21 pursuant to applicable law. Within 60 days after Final Disposition, each Recipient
 22 must return to the Designator or destroy all Protected Information, includes all
 23 copies, abstracts, compilations, summaries, and any other format reproducing or
 24 capturing any of Protected Information. Whether the Protected Material is returned
 25 or destroyed, the Recipient must submit a written certification to the Designator
 26 within 60 days after Final Disposition that (1) identifies (by category, where
 27 appropriate) all the Protected Information that was returned or destroyed and (2)
 28 affirms that the Recipient has not retained any copies, abstracts, compilations,

1 summaries, or any other format reproducing or capturing any of the Protected
2 Material. Notwithstanding this provision, counsel are entitled to retain an archival
3 copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal
4 memoranda, correspondence, deposition and trial exhibits, expert reports, attorney
5 work product, and consultant and expert work product, even if such materials
6 contain Protected Material. Any such archival copies that contain or constitute
7 Protected Material remain subject to this Protective Order.

8
9
10 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

11
12 DATED: November 12, 2013 PERKINS COIE LLP

13
14 By: 

Jon C. Daryanani

15 Attorneys for Defendants
16 SEMBLANT, INC. and STEVE LOWDER

17 DATED: November 14, 2013

LAW OFFICES OF RANDALL M.
WIDMANN

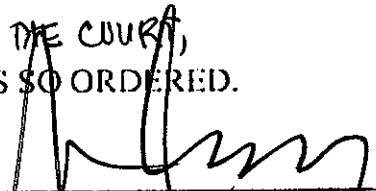
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19 By: 

Randall M. Widmann

20 Attorneys for Plaintiff
21 DONALD MAY

22
23 AS MODIFIED BY THE COURT,
24 PURSUANT TO STIPULATION, IT IS SO ORDERED.

25
26 DATED: 11/21/13


27 Hon. Edward J. Davila
28 United States District Judge

HOWARD R. LLOYD

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of perjury that I
have read in its entirety and understand the Stipulated Protective Order that was issued by the
United States District Court for the Northern District of California on _____ [date] in the case
of *Donald May v. Semblant Inc. and Steve Lowder*, CV13-01576 EJD. I agree to comply with
and to be bound by all the terms of this Stipulated Protective Order, and I understand and
acknowledge that failure to so comply could expose me to sanctions and punishment in the nature
of contempt. I solemnly promise that I will not disclose in any manner any information or item
that is subject to this Stipulated Protective Order to any person or entity except in strict
compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full
name] of _____ [print or type full address and
telephone number] as my California agent for service of process in connection with this action or
any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____
[printed name]

Signature: _____
[signature]